CLERK'S COPY.

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 268.

AYER & LORD TIE COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE COMMONWEALTH OF KENTUCKY, BY FRANK A. LUCAS, REVENUE AGENT OF SAID COMMONWEALTH.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MAY 22, 1905.

(19,769.)

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Please Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 17th day of December, 1903.

COMMONWEALTH OF KENTUCKY, by FRANK A. Lucas, Revenue Agent for the State at Large, Appellant,
*vs.*
THE AYER & LORD TIE COMPANY, Appellee.
} Appeal *for* the McCracken Circuit Court.

Be it remembered that heretofore to-wit, on the 23rd day of March A. D. 1903 the appellant by his attorney filed in the office of the clerk of the court of appeals, a transcript of the record, in words and figures as follows, to wit—

1.

Please Before the Hon. L. D. Husbands, Judge of the McCracken Circuit Court, at the Court House, in the City of Paducah, Ky., on the 5th day of February, 1903.

COMMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent, Pl'ff,
*vs.*
AYER & LORD TIE COMPANY, Def't.

Be it remembered that heretofore to-wit, on the 21st day of October, 1902, the pl'ff, by attorney, filed in the clerk's office of the McCracken circuit court the following transcript from the McCracken county court, viz:—

Transcript from McCracken County Court.

STATE OF KENTUCKY:

McCracken County Court, Regular Term, 1st Day, September 8th, 1902.

Hon. R. T. Lightfoot, Judge, Presiding.

COMMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent, Pl'ff,
*vs.*
THE AYER & LORD TIE COMPANY, Def't.

This day came defendant and offered to file petition for removal of this action to the U. S. court and also offered to file bond under act of Congress with H. Baker & James Campbell sureties thereon, to all of which the plaintiff objects and this case is continued.

Afterwards to-wit: on the 17th day of October, 1902 the following order was made herein, viz:

The following order was entered of record herein *nunc pro tunc* as of the 27th day of September, 1902.

This day the following judgement was filed herein, and ordered recorded viz:—

This day the question coming on to be heard by the court on the demurrer entered to the defendant's answer, the court being sufficiently advised adjudges that said demurrer be overruled, to which pl'ff, excepts, and the plaintiff declining to further plead, elects to abide the demurrer, and thereupon the court dismissed the plaintiff's statement and action, to all of which the plaintiff accepts and prays an appeal to the circuit court of McCracken county, which is granted.

Afterwards to-wit, on the 20th day of October, 1902, the following order was made herein, viz:—

The following order is entered of record *nunc pro tunc* as of the 26th day of September, 1902

This day came plaintiff and filed answer herein, and this matter is continued.

4 STATE OF KENTUCKY, }
County of McCracken, } *sct:*

I, Chas. E. Graham, clerk of the McCracken county court, certify that the foregoing pages contain a full, true and complete copy of all the orders made in the foregoing styled action and that there appears attached thereto, all the original papers filed in said action, also a taxation cost therein.

Given under my hand, this 20th day of Oct., 1902.

CHAS. E. GRAHAM, Clerk.
By H. SNEDLEY, D. C.

COMMONWEALTH OF KENTUCKY, by, &c., Pl'ff, }
*vs.* } Taxation Cost.
AYER & LORD TILE COMPANY, Def't. }

| | |
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| | 5.90 |
| | .60 |
| | $6.50 |

The following is the summons which is issued on the foregoing appeal, viz:—

Summons.

STATE OF KENTUCKY:

McCracken Circuit Court.

COM'TH OF KENTUCKY, &C., Appellant,
*vs.*
THE AYER & LORD TIE COMPANY, Appellee. } Summons of Appeal.

To the sheriff of McCracken county:

You are hereby commanded to summon the Ayer & Lord Tie Company to appear in the McCracken circuit court on the 1st day of its next December term, and answer the appeal taken by the Commonwealth of Kentucky by Frank A. Lucas, revenue agent, from a judgement rendered by McCracken count- court in the action wherein the said Com'th of Ky &c. was the pl'ff, and said Ayer & Lord Tie Company was def't.

6 Witness my hand, as clerk of said court, this 21st day of October, 1902.

H. H. HOBSON, Clerk.
By W. C. KIDD, D. C.

Endorsed on back as follows, viz:

Sheriff Return on Summons.

Executed on the Ayer & Lord Tie Company by delivering to H. Baker, resident agent for said company in McCracken county Nov. 25, 1902.

L. D. POTTER, S. McC. C.
By WM. LYDON, D. S.

The following are the original papers from the McCracken county court, filed in the clerk's office of the McCracken circuit court, on the 21st day of Oct., 1902, in this action, referred to in the foregoing transcript, from said county court, viz:—

Statement.

Plaintiff states that Frank A. Lucas was, on the 28th day of June, 1902, duly appointed revenue agent for the Commonwealth of Ky., State at large, by the auditor of public accounts for the Commonwealth of Kentucky, and executed bond and duly qualified, and is now action as such revenue agent and by reason of his office, now prosecutes this action in the name of the Commonwealth of

7 Ky. Plaintiff further says that the defendant, the Ayer — Lord Tie Company, is a corporation, duly organized, and en-

gaged in the business of buying, transporting, and dealing in railroad ties, and has been so incorporated and so engaged continuously from the 16th day of November, 1898, to the date of the filing of this statement, and that it has an office in the city of Paducah, in the county of McCracken and State of Kentucky.

Plaintiff states that the defendant was, on the 15th day of September, in the years 1899, 1900 and 1901, the owner, seized of, and in possession of two certain steamboats known as the Russel Lord, and the Pavonia; that the value of said steamboats, the "Russel Lord," on each of said days, was $3,000.00 and of the said steamboat, "Pavonia," $3000.00, that said steamboats were, on each of said days, enrolled, in accordance with the laws of the United States governing navigation, at the port of Paducah, in the county of McCracken and State of Kentucky; that, as required by the said laws of the United States governing navigation, the words, of "Paducah, Kentucky," were painted on the stern of said steamboats; that said boats when not in use, are kept at Paducah, Ky., and that the said port of Paducah is, and was on each of said days, the home
8 port of said steamboats.

Plaintiff further says that the defendant was, on the 15th day of September, in the year 1901, the owner, seized of, and in possession of the steamboat "Iverness," and that the value of the said steamboat on said day was $10,000.00; that said boat was, on said day, enrolled, in accordance with the laws of the United States governing navigation, at the port of Paducah, in the county of McCracken and State of Kentucky; that, in accordance with said laws of the United States governing navigation, it had the words, "of Paducah, Kentucky," painted on its stern, that said boat when not in use is kept at Paducah, Kentucky., and that said port of Paducah was, on said day, the home port of said steamboat.

Plaintiff further states that each and all of said boats are now and were on each of the above days mentioned, used by the defendant for the purpose of towing ties, loaded on barges; that the defendant was, on each of the days aforesaid, the owner, seized of, and in possession of certain barges; used in connection with said steamboats, for the purpose of transporting railroad ties, and that said barges were, on the 15th day of September in each of the years 1899, 1900, and 1901, of the value of $10,000.
9 Plaintiff further says that the defendant failed and refused, and still fails and refuses, to assess any of said steamboats or barges for *at*xation for any of said years; and that the same are omitted and have never been assessed for either of said years; and it further states that no taxes for the Commonwealth of Kentucky, or the county of McCracken, or the city of Paducah, have been paid on any of said steamboats for any of said years.

Wherefore, plaintiff prays that said steamboat, the "Russell Lord," be assessed to the defendant, The Ayer — Lord Tie Company, for the purpose of State, county, and municipal taxation, due in and for the years 1900, 1901, and 1902, at $13,000; that the steamboat

"Pavonia" be assessed to the defendant, for taxes due in and for each of said years, at $3000.00; that the steamboat "Iverness" be assessed to the defendant, for taxes due in and for the year 1902, at $10,000 and that the barges above described be assessed to the defendant, for taxes due in and for each of the years 1900, 1901, and 1902, at $10,000; and that the defendant be adjudged to pay a penalty of 20 %, on the aggregate amount of taxes due and interest, and to pay the cost of this proceeding, and plaintiff prays
10 for all proper and general relief.

COMMONWEALTH OF KENTUCKY,
By FRANK A. LUCAS,
Revenue Agent, State at Large.

The foregoing statements are true, to the best of my knowledge and belief.

FRANK A. LUCAS.

Subscribed and sworn to before me, by Frank A. Lucas, this 22nd day of August, 1902.

L. K. TAYLOR,
Examiner, McCracken Co., Ky.

Petition for Removal to U. S. Court.

Now comes your petitioner Ayer & Lord Tie Company, and states that said Frank A. Lucas, the plaintiff in the aforesaid action who brings this suit for the Commonwealth of Kentucky, is a citizen of the State of Kentucky, that said cause can be fully and finally determined in the United States circuit court for the sixth circuit and the western district of Kentucky, that your petitioner, Ayer & Lord Tie Company, is a citizen from the State of Illinois, is a corporation created by and under the laws of the State of Illinois, a certified copy of the certificate or charter is herewith filed as part
11 hereof marked "A," engaged in business under its charter in the State of Illinois, that the Commonwealth of Kentucky is one of the States in the United States and is a State foreign to the State of Illinois, that the amount in controversy in the aforesaid cause amounts to more in value than the sum of two thousand dollars, exclusive of interest and cost.

And petitioner makes and files in this court a bond, with good and sufficient security, for its entering in such circuit court on the 1st day of its next session, a copy of the records in said suit, and for paying all costs that may be awarded for said circuit court, if said court shall hold that said suit shall be wrongfully or improperly transferred thereto, and also for the appearing and entering of special bail in such suit if special bail was originally requisite therein, and they pray of said court to accept said petition and bond and order the transfer of said cause to the said circuit court of the United States.

H. Baker says that he is the managing agent for the Ayer & Lord Tie Company, that the president and other officers of said company are beyond the county of McCracken, and that he believes
12 the statements in the foregoing petition are true.

H. BAKER.

Subscribed and sworn to before me by H. Baker, this 8th day of September, 1902.

— —.

The following is Exhibit "A" referred to in the foregoing petition to remove the U. S. court, viz:

EXHIBIT "A."

STATE OF ILLINOIS,
DEPARTMENT OF STATE.

William H. Hinrichen, secretary of state, to all to whom these presents shall come, Greeting.

Whereas, a statement duly signed and acknowledged has been filed in the office of the secretary of state on the 1st day of August, A. D. 1893 for the organization of the Ayer & Lord Tie Company, under and in accordance with the provisions of "An act concerning corporations," approved April 18th, 1872 and in force July 1st, 1872, and all acts amendatory thereof, a copy of which statement
13 is hereto attached.

And whereas, a license has been issued to Ed. E. Ayer, Jonn B. Lord and Phillip R. Smith as commissioners to open books for subscription to the capital stock of the said company,

And whereas, the said commissioners have on the 15th of August, A. D. 1903, filed in the office of the secretary of state a report of their proceedings under said license, a copy of which report is hereto attached.

Now, therefore, I William H. Hinrichen, secretary of the State of Illinois, by virtue of the powers vested in me by law do hereby certify that the said, Ayer & Lord Tie Company is a legally organized corporation under the laws of this State.

In testimony whereof, — hereto set my hand and cause to be affixed the great seal of State.

Done at the city of Springfield this 15th day of August
[SEAL.] in the year of our Lord one thousand eight hundred and 93, and of the Independance of the United States the one hundred and 18.

(Signed) W. H. HINRICHEN,
Secretary of State.

STATE OF ILLINOIS, } ss :
County of Cook. }

, Wm. S. Patch, a notary public, in and for the county of Du ge, State of Illinois do hereby certify that the above is a true and rect copy of charter granted the Ayer & Lord Tie Company, ler the laws of the State of Illinois.

[SEAL.] WM. S. PATCH,
Notary Public.

Know all men by these presents, that we, Ayer & Lord Tie Com- ny principal and H. Baker and James Campbell as sureties are d and firmly bound unto the Commonwealth of Kentucky, nk A. Lucas revenue agent for the Commonwealth of Kentucky, l to all others whom it may concern in the sum of three hundred lars, to which payment we bind ourselves and each of us by these sents. Given under our hand this 8th day of September, 1902. The conditions of this obligations are these: The said Ayer & Lord Tie Company, has applied to the county court in said count-, to remove a certain cause pending in said court, wherein the Commonwealth of Kentucky Frank A. Lucas enue agent for the Commonwealth of Kentucky is plaintiff, and Ayer & Lord Tie Company is the defendant, from said county rt to the circuit court of the United States for the sixth circuit l western district of Kentucky.

Now if said Ayer & Lord Tie Company shall enter in the said cuit court of the United States in the western district of Ken- ky, on the 1st day of the next term thereof, a copy of the record said suit and shall pay all the costs that may accrue or be awarded said circuit court, if it shall hold that the said suit was wrongfully improperly removed thereto, and shall also appear and enter special l in said circuit court in said suit, if special bail was originally uired therein, then this obligation shall be void; otherwise in l force.

AYER & LORD TIE COMPANY,
By H. BAKER, Agent.

H. BAKER,
JAMES CAMPBELL, Sureties.

Answer.

The Ayer & Lord Tie Company, that has been summoned in this case, in answer to the statement filed by the plaintiff in this case, comes and says; that it is a corporation duly and legally orporated under and by laws of the State of Illinois, on the 15th of August, 1893, and as such it has been empowered to transact siness with steamboats, engaged in interstate commerce, that a rter was granted to it under the seal and signature of W. H.

Hinrichsen, secretary of state, which certificate, is herewith filed as part hereof, marked "A;" it says that ever since its incorporation it has been engaged in business as owner of tow-boats, plying on the Miss., Ohio, Tenn., and Cumberland rivers and their tributaries, that the business in which tow-boats had been engaged is that of interstate commerce and of transporting railroad ties in its own barges from different points of said rivers to the port of Brookport, in the State of Ill., that their said tow-boats in pursuit of their business, occasionally touch at the point of Paducah, Ky., but never to discharge their cargo, but simply for the purpose of buying stores, employing seamen, and for other like purposes, that they and said barges are in the State of Kentucky but tempora-/ly, and most of their business is transportations
17 from ports and places in Alabama, Miss., Ky., Mo., Ark., Ill., and Tenn., to said port of Brookport, in the State of Ill., St. Louis, in the State of Mo., Duvals Bluff in the State of Ark., at which ports, said tow-boats discharge and deliver their respective cargo of ties, and said boats and barges owned and controlled by Ayer & Lord Tie Company, was engaged in the business aforesaid during and prior to years 1899, 1900 and 1901, and since owned by the said defendant company, have never been engaged in any other business but as aforesaid, nor has said company, since its incorporation, been engaged in any other business, than as aforesaid; that their said vessels were and are regularly licensed and enrolled by the United States under and in pursuance to the acts of Congress.

It says it has its main office in the city of Chicago, in the State of Illinois, and also has offices in the city of Mound City, in the State of Illinois, on the Ohio river, also in the port of Brookport, in the State of Illinois on the Ohio river and has an office in the State of Kentucky at Paducah, and Fulton, and also at Duvals Bluff, in the State of Arkansas, and these offices are in the State of Kentucky for convenience, but the principal office in the defendant corporation was, and is in the State of Illinois, of which State it
18 is a citizen, but denies the right of the State of Kentucky to cause to be assessed for taxation, for State, county or municipal purposes, the steamboats, Russell Lord, Pavonia, and Iverness, and its said barges or any of said property.

It says that it has the right under the acts of Congress of the United States, and the Constitution of the United States, to trade at the port of Paducah, Ky., Brookport, Ill., Mound City, Ill., and at ports on the Tenn., Miss., Cumberland and Ohio rivers, and their tributaries, free from molestation or interference on the part of the State of Kentucky, and says that the proceeding on the part of the State of Kentucky, by its agent Frank A. Lucas, to have its said property assessed for taxation, is an infringement of the rights of the defendant corporation, under the interstate commerce act, of the United States, and under the Constitution of the United States. Defendant denies that the State of Kentucky has any jurisdiction whatever, over the defendants steamboats, on said barges, for the

purpose of taxation, and says that this court has no jurisdic-
19 tion to try or determine this case, and it pleads to the juris-
diction of this court, and denies that this court has jurisdiction to cause defendants property or any of it mentioned in the statement, to be assessed for taxation for said municipal, county or State purposes.

Defendant says that its right to trade at the ports of the different States without molestation, by the State of Kentucky, or any of the other States, are secured to it by the Constitution of the United States; it denies the right of the State of Kentucky, to interfere by way of taxation or otherwise, with the defendants right to trade or engage in interstate commerce, as stated in this answer.

Second: Defendant says that it is true, that during these years mentioned in the statement, it was the owner of the steamer, Russel Lord, steamer Pavonia, and of the Iverness, and it's said barges, in the year 1901, but denies that the said steamer Inverness, was of value at any time, since the defendant has owned it of the sum of $10,000, was not of a value exceeding $2500.00.

Defendant denies the allegation that the home port speaking, of said vessels during the years 1899, 1900, 1901, was at the
20 port of Paducah, and defendant denies the right of the State of Kentucky to assess any of said property for taxation, but says that said property was taxable, under the laws of the State of Illinois, and nowhere else where owner resided, at the time; it denies that same was subject to any taxation whatever, on the part of the State of Kentucky, during either of said years, 1899, 1900, 1901. It says that all of said property during these years, was assessed by the defendant in the State of Illinois, for taxation, and has been taxed, and defendant has paid taxes under the State of Illinois to said State and city of Chicago on all of said property, and denies the right of the State of Kentucky to subject same property to taxation. Defendant further answering says, that H. Baker, upon whom notice in this case was served, was, during the said years, 1899, 1900, the general managsr of the transportion department of said Ayer & Lord Tie Company, of it's said steamboats, Russel Lord, Pavonia, and in 1991 of steamer and it's barges Inverness, and for convenience sake, and under the act of Congress, said steamers were enrolled or registernd at the port of Paducah, Ky., and said Baker, being a resident of the State of Kentucky, in which ports it
21 is proper to register or enroll said boats.

Wherefore defendant prays that this proceeding be dismissed absolutely, and for costs and for all other proper relief.

CAMPBELL & CAMPBELL,
Att'ys for Def't.

The Exhibit "A" referred to in the foregoing answer, will be found copied on page 9, of this transcript.

Judgement of County Court.

This day the questions coming on to be heard by the court on the demurrer entered to the defendant's answer, the court being sufficiently advised, adjudges that said demurrer be overruled, to which plaintiff excepts, and the pl'ff declining to further plead elects to abide the demurrer, and thereupon the court dismissed the plaintiff's statement and action, to all of which the plaintiff excepts and prays an appeal to the circuit court of McCracken county, which is granted.

Afterwards to wit:—at the January term, 1903 of the McCracken circuit court, on the 7th day of January, 1903, the following order was made herein, viz:—

This day came pl'ff and filed demurrer to def't's answer. (See page 16) Exhibit "A."

22 The following is the demurrer referred to in the foregoing order, viz:—

Demurrer to Answer.

Pl'ff comes and demurs to the answer of the defendant herein, because it says same does not state facts sufficient in law to constitute a defense to plaintiff's petition herein.

COM'TH OF KY.,
By FRANK A. LUCAS,
Revenue Agent.

Afterwards to-wit:—at the same term of the above named court, on the 10th day of Jan., 1903, the following order was made herein, viz:—

Appeal Granted.

The pl'ff's demurrer to def't's answer heretofore filed herein, coming on to be heard and the court being sufficiently advised overruled said demurrer to which ruling of the court the pl'ff object- and except- and pray- an appeal to the court of appeals which is granted.

23 Afterwards to-wit:—at the same term of the above named court, on the 5th day of Feb., 1903, the following order was made herein, viz:—

This day the following judgement was filed herein, viz:—

Judgement.

This day this cause coming on to be heard, the court overruled the motion heretofore entered by defendant to approve its bond and transfer this case to the circuit court of the United States for

the western district of Ky., and dismissed the petition for said removal, said petition having been filed in this court as part of the record from the county court, to all of which the defendant objected and excepted. The court being sufficiently advised, then overruled the plaintiff's demurrer to the defendant's answer, to which the plaintiff objected and excepted, and the cause submitted to the court by agreement, and plaintiff declining to plead further, and electing to abide its demurrer to the answer of the defendant herein, it is therefore the judgement of the court that the statement of pl'ff herein be dismissed, to all of which the pl'ff objected and excepted at the time, and still objects and excepts and prays an appeal to the court of appeals, which is granted.

Afterwards to-wit:—at the same term of the above named court, on the 26th day of Feb., 1903, the following order was made herein, viz:—

This day came def't, and filed bill of exceptions, which was signed by the judge of this court, and the same is now made a part of the record of this action. And said def't entered motion and moved the court for a judgement against the pl'ff, Frank A. Lucas, for the cost of this action, and the court being advised overruled said motion, to which the def't objected and excepted.

The following is the bill of exceptions referred to in the foregoing order, viz:—

## Bill of Exceptions.

Be it remembered, that on the trial of this case, and before the court had action on the demurrer to the def't's answer herein, the def't presented a bond, signed by the def't and H. Baker and James Campbell as sureties, and also presented to the court a petition for the transfer of this action to the circuit court of the United States, for the sixth circuit and western district of Kentucky, and moved the court to approve of said bond and permit said bond to be filed, and to permit said petition for transfer to be filed, and to transfer said action to said circuit court of the United States, for the sixth circuit and western district of Kentucky; that pl'ff objected to said motion to file said petition and transfer said action to the circuit court of the United States for the western district of Kentucky, and the court thereupon sustained the objections made by the pl'ff, and refused to transfer said action or permit said petition to be filed, to all of which the def't objected and excepted at the time and still excepts. Said bond, signed by the defendant and by H. Baker and James Campbell, it's sureties, is in words and figures as follows, to-wit:—

Know all men by these presents, that we, Ayer & Lord Tie Company principal and H. Baker and James Campbell as sureties are held and firmly bound unto the Commonwealth of Kentucky, Frank A. Lucas, revenue agent for the Commonwealth of Kentucky and to all others whom it may concern in the sum of three

hundred dollars, to which payment we bind ourselves and each o
us by these presents. Given under our hand this 8th day of Sep
1902.

The conditions of this obligation are these: The said Ayer & Lor
Tie Company, has applied to the county court in said county to r
move a certain cause pending in said court, wherein the Commo
wealth of Kentucky, Frank A. Lucas revenue agent for the Commo
wealth of Kentucky is plaintiff, and the Ayer — Lord Tie Company
the defendant, from said county court to the circuit court of th
United States for the sixth circuit and western district of Kentucky
Now if said Ayer & Lord Tie Company shall enter in the said ci
cuit court of the United States in the western district of Kentuck
on the 1st day of the next term thereof, a copy of the record of sai
suit and shall pay all the costs that may accrue or be awarded b
said circuit court, if it shall hold that the said suit was wrong
27 fully or improperly removed thereto, and shall also appea
and enter special bail in said circuit court in said suit, if specia
bail was originally required therein, then this obligation shall b
void, otherwise in full force.

AYER & LORD TIE COMPANY.
By H. BAKER, Ag't.

H. BAKER,
JAMES CAMPBELL,
Sureties.

Said petition for removal of said action to the circuit — of th
United States for the western district of Kentucky is in words an
figures as follows, to-wit:—

Now comes your petitioner, Ayer & Lord Tie Company, and state
that said Frank A. Lucas, the pl'ff in the aforesaid action who bring
this suit for the Commonwealth of Kentucky, is a citizen of the Stat
of Kentucky, that said cause can be fully and finally determined i
the United — circuit court for the sixth circuit and the western di
trict of Kentucky, that your petitioner Ayer & Lord Tie Company
is a citizen of the State of Illinois, is a corporation created by an
under the laws of the State of Illinois, a certified copy of the certifi
cate or charter is herewith filed as part hereof marked "A,
28 engaged in business under its charter in the State of Illinois
that the Commonwealth of Kentucky is one of the States i
the United States and is a State foreign to the State of Illinois, tha
the amount in controversy in the aforesaid cause amounts to mor
in value than the sum of two thousand dollars exclusive of interes
and cost.

And petitioner makes and files in this court a bond, with good
and sufficient security, for its entering in such circuit court on the
1st day of its next session, a copy of the record in said suit, and fo
paying all costs that may be awarded for said circuit court, if said
court shall hold that said suit shall be wrongfully or improperly
transferred thereto, and also for the appearing and entering of specia

bail in such suit if special bail was originally requisite therein, and they pray of said court to accept said petition and bond and order the transfer of said cause to the said circuit court of the United States. H. Baker says that he is the managing agent for the Ayer & Lord Tie Company, that the president and other officers of said company are beyond the county of McCracken, and that he believes the statements in the foregeing petition are true.

H. BAKER.

29 Sworn and subscribed to before me by H. Baker, this 8th day of September, 1902.

L. D. HUSBANDS, Judge.

Clerk's Certificate.

STATE OF KENTUCKY, County of McCracken, } *sct:*

I, H. H. Hobson, clerk of the McCracken circuit court, within and for the county and State aforesaid, do certify, that the foregoing twenty-eight typewritten pages and this page contains a full, true and complete transcript of the action therein named as the same appears of record and on file in my office.

Given under my hand as clerk of said court, this 10th day of Mar., 1903.

H. H. HOBSON, Clerk,
By —— ——, D. C.

Cost of record $9.20.

30 With the foregoing transcript the appellant filed a statement in the office of the clerk of the court of appeals in words and figures following to-wit:—

Court of Appeals of Kentucky.

COMMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent for the State at Large, Appellant,
*vs.*
THE AYER & LORD TIE COMPANY, Appellee. } Statement.

The judgement appealed from in this action was rendered at the January term, 1903, of the McCracken circuit court, and is found on page 23 of the record in this action. No summons or warning order is desired.

——— ———,
Revenue Agent.

Be it remembered that on the 21st day of May 1903 in the court of appeals of Kentucky at Frankfort the following order was entered to-wit—

COMMONWEALTH, by, etc., vs. AYER & LORD TIE CO. } McC.

"Came appellee by counsel and filed grounds and moved the court to grant an oral argument herein which motion is sub-
31 mitted.

And afterwards on the 22nd day of May 1903 at a court of appeals at the capitol at Frankfort the following order was entered to-wit—

COMMONWEALTH, Use, etc., vs. AYER & LORD TIE COMPANY. } McCracken.

"The court being sufficiently advised it seems to them the motion herein should be sustained, and case is therefore continued for oral argument.

And afterwards on the 20th day of October 1903 at a court of appeals at the capitol at Frankfort the following order was entered—

"COMMONWEALTH, etc., vs. AYER & LORD TIE COMPANY. } McCracken.

Came parties by counsel and on motion and by consent this case is passed on the argument *document*, from Nov. 17th to December 8th, 1903.

And afterwards on the 9th day of December, 1903 at a court of appeals at the capitol at Frankfort, the following order was entered—

"COMMONWEALTH vs. AYER & LORD TIE COMPANY. } McCracken.

This case coming on to be heard was argued by James
32 Campbell for appellee, and by Frank A. Lucas for appellant and submitted.

And afterwards on the 17th day of December 1903 at a court of appeals at the capitol at Frankfort the following judgement was entered to-wit—

ONWEALTH OF KENTUCKY, by, etc., Appellant, vs. AYER & LORD TIE COMPANY, Appellee. } Appeal *for* the McCracken Circuit Court.

he court being sufficiently advised it seems to them, the judget herein is erroneous.
is therefore considered that said judgement be reversed, and se remanded for proceedings consistent with the opinion herein. ich is ordered certified to said court. It is further considered t the appellant recover of the appellee its costs herein expended. d on said date the court delivered the following opinion :—

Court of Appeals of Kentucky.

(To Be Reported.)

DECEMBER 17, 1903.

MMONWEALTH OF KENTUCKY, by, etc., Appellants, vs. AYER & LORD TIE COMPANY, Appellee. } Appeal from McCracken Circuit Court.

3 Opinion of the Court by H. S. Barker, Judge.

This is a proceeding instituted by the auditor's agent, Frank A. ucas, against appellee, under the provisions of section 4241, Kenucky Statutes, to enforce the listing for taxation of certain steam oats owned by it, engaged in interstate commerce on the Ohio, umberland Tennessee and Mississippi rivers.

The appellee is a corporation organized under the laws of the tate of Illinois, having its principal office in Chicago; it also has offices in Paducah and other cities along the rivers upon which it engages in navigation. The steamboats in question are the Russel Lord, Pavonia and Inverness. The years, for which these vessels are sought to be listed for taxation, are 1899, 1900 and 1901. These are registered in Paducah, Kentucky, and each of them has painted on its stern, in compliance with the statutes of the United States, the words "of Paducah, Ky."

34 To the petition, appellee filed an answer, admitting that the vessels sought to be taxed are registered at Paducah, Ky., and that they have the words "of Paducah, Kentucky," painted on their sterns. Their values, as alleged in the petition, are denied, as is also the allegation that Paducah is their home port; and it is alleged, affirmatively, that appellee is an Illinois corporation, having its chief office and place of business in Chicago; that its vessels are engaged in inter-state commerce upon the rivers before men-

tioned; that they are taxed in Chicago, the domicile of their owner, and are not taxable by the State of Kentucky, in Paducah or elsewhere. The answer concludes with the following allegation:

"Defendant further answering, says, that H. Baker, upon whom notice in this case was served, was, during the said years, 1899, 1900, the general manager of the transportation department of said Ayer & Lord Tie Company, of its said steamboats, Russel Lord, Pavonia, and in 1901 of steamer and its barges Inverness, and for convenience sake, and under the act of Congress, said steamers were enrolled or registered at the port of Paducah, Ky., and said
35 Baker, being a resident of the State of Kentucky, and in which ports it is proper to register or enroll said boats."

To this pleading, a general demurrer was interposed by appellant, which was overruled, and declining to plead further, its petition was dismissed; from which judgement, this appeal is prayed.

The allegations of the petition, which are admitted by the answer, and the allegations of the answer, which are admitted to be true by the demurrer, aptly raise the question as to whether or not the steamboats of appellee are taxable by the Commonwealth of Kentucky.

Ordinarily, the residence of the owner is the situs for taxation of personal property; but this rule is, by no means, without exception, and it often happens that personal property obtains a situs of taxation in a jurisdiction foreign to the residence of its owner. Vessels engaged in navigation upon the high seas, and upon the Great Lakes and rivers of the United States, are often separated by long distances from the residences of their owners; such vessels, insofar as they are the property of citizens of the United States, are governed by its laws.

36 It has been deemed wise by the General Government, from the earliest period of its existence, that all vessels engaged in inter-state, or inter-national commerce, should have a home port, where they are registered and enrolled, enjoy certain privileges, and are subject to certain burdens and duties; and that all who have business transactions with them may know beyond question their home port, it is required by statute, that its name shall be painted in a certain way upon the stern of each vessel. By an act of Congress, which become a law Dec. 31, 1792, (sec. 4141, Revised Statutes) it is provided:

"Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection- district, which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

SECTION 4178. "The name of every registered vessel, and of the port to which she shall belong, shall be painted on her stern,
37 on a black ground, in white letters, of not less than three inches in length. If any vessel of the United States shall be

found without having her name and the name of the port to which she belongs so painted, the owner or owners shall be liable to a penalty of fifty dollars;"

SECTION 4334. "Every licensed vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting the owner thereof shall be liable to a penalty of twenty dollars."

It will be observed, that by the foregoing statute, the home port of vessels belonging to citizens of the United States was the residence of the owner, if there was but one, or that of the residence of the vessel's husband, if there were more than one owner, and the name of this home port was to be painted on the stern of the vessel. Thus stood the law regulating this subject, until the year 1884, when, by an act of Congress, entitled "An act to remove certain burdens on the American merchant marine, and to encourage the Amer-
38 ican foreign carrying trade, and for other purposes," it was provided that the word 'port,' as used in sec. 4178 and 4334 of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of said vessels, shall be construed to mean, either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built; or where one or more of the owners reside." This changed the requirement, that the home port should be the residence of the owner, and granted the option of selecting one of three places as a home port, to wit: the port of registry, the place in the same district where the vessel was built, or where one or more of the owners reside. In 1891 and 1897, section 4178 was amended, so as to read as follows:

"The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilted, or consist of cut or carved or cast Roman letters, in light color on a dark ground, or in a dark color on a light ground, se-
cured in place, and to be distinctly visible. The smallest
39 letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked, the owner or owners shall be liable to a penalty of ten dollars for each name omitted:"

Appelle had a right to cause its boats to be registered at Paducah, although that was not the place nearest to the port where it resided, and it fully complied with the law regulating the subject, by painting the words "of Paducah, Ky.," on the sterns thereof; and by the amendment of 1884, Paducah became the home port of the vessels so registered and marked.

The question, then, for adjudication, is whether or not the home port of a vessel is the situs for its taxation, although its owner may reside in a foreign country or State, as in the case under consideration. Judson, in his work on Taxation, (section 186) says: "Steam-

boats and vessels navigating the public or navigable waters of the United States, are taxable as property, irrespective of the residence of the owner, in the home port of the vessels, which is said to be their situs for taxation." And in Cooley on Taxation, 3rd
40 edition, vol. 1, p. 651: "Vessels are commonly taxable only at the port of registry, although the place of enrollment or registration does not necessarily fix the situs for taxation, which may be at the owner's domicile, or in a State where the owner does not reside, if the vessel's business is wholly in such State for an indefinite period."

In the case of Hays *vs.* Pacific Mail Steamship Co., 17 How., 596, the Supreme Court of the United States said:

"The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State is familiar in the admiralty law. She is subjected in many cases, to the application of a different set of principles. 7 Pet., 324; 4 Wheat., 438."

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation, they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where
41 the taxes had been paid."

In the case of Moran *v.* New Orleans, 112 U. S., 653, it was said:

"And it is undoubtedly true, as it has often been judicially declared, that vessels engaged in foreign or interstate commerce and duly enrolled and licensed under the acts of Congress, may be taxed by State authority as property; provided, the tax be not a tonnage duty, is levied only at the port of registry and in valued as other property in the State, without unfavorable discrimination on account of its employment. Transportation Co. *v.* Wheeling, 99 U. S. 273; Morgan *v.* Parham, 16 Wall. 471; Hays *v.* Steamship Co., 17 How. 596; Ferry Co. *v.* East St. Louis, 107 U. S. 365."

(See, also, Battle *v.* Mobile, 9 Ala. 234; Irvin *v.* St. Louis and C. R. R. Co., 94 Ill. 105; People *v.* Pacific Mail Steamship Co., 58 N. Y. Rep. 242; City of Newport *v.* Berry, 14 K. L. R. 29.)

The steamboats involved in this litigation are separated from the residence of their owner by a long distance; in fact, they can never visit the port at which their owner resides; they are, so far
42 as their actual situs is concerned, permanently confined to the rivers over which they float; if their home port had to be Chicago, because that is the residence of their owner, as under the law prior to 1884, then, they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by Congress, permitting their owners to select for them a home port in the field of their operations, which

s for them a home port in fact, as well as in law and name. Prop-
rty, such as that under consideration, ought, logically, to be taxed
t its own home port: there it can be seen and properly valued for
ssessment by the fiscal officers; whereas, at the residence of its
wner (Chicago) the officers, of necessity, must rely on the state-
ments of the owner for both the existence of the property and its
alue. At its home port, it enjoys the protection of the laws of the
risdiction in which it is located, and both justice and reason
ould seem to require that property, thus permanently located, both
n legal contemplation and in fact, within a jurisdiction foreign to
that of its owner, should contribute its fair share to the sup-
3 port of that government whose protection it enjoys.

We conclude, therefore, that as Paducah, Ky., is the home
ort of the vessels in question, that place is their situs for taxation,
nd the demurrer to the answer should have been sustained.

There is no pretense in this case, that appellee's property is sought
o be taxed in a manner different from that in which all other prop-
rty in Kentucky is taxed, or that there is any unjust or invidious
iscrimination between it, and property of the citizens of Kentucky.

There was a petition and bond tendered in the county court where
his proceeding originated, and a motion to remove it to the Federal
ourt, on the ground of diversity of citizenship between appellee and
he Commonwealth of Kentucky. This motion was overruled, and
orrectly so; the Commonwealth of Kentucky is not a citizen with-
n the meaning of the statute authorizing the removal of causes from
he State to the Federal court, on the ground of diversity of citizen-
hip. (Chicago, St. Louis and New Orleans R. R. Co. *v.* Common-
ealth, 24 K. L. R. 2124.

For the reasons indicated, the judgment is reversed for proceed-
ngs consistent with this opinion.

4 & 45 And afterwards on the 12th day of January 1904 at a court of appeals at the capitol at Frankfort the following rder was entered—

COM'TH OF KY., by FRANK A. LUCAS, Rev. Ag't, *vs.* AYER & LORD TIE COMPANY. } McCracken.

Came appellee by counsel and on its motion is given 30 days additional time to file a petition for rehearing.

And afterwards on the 12th day of February 1904 at a court of ppeals at the capitol at Frankfort the following order was entered—

"COM'TH OF KY., ETC., *vs.* AYER & LORD TIE CO. } McCracken.

Came appellee by counsel and filed a petition and moved the ourt to grant a re-hearing which motion is submitted.

The petition for re-hearing is in words and figures as follows:

46 Petition for Rehearing.

We have carefully read and considered the opinion of this court rendered in this action on December 17, 1903. We are constrained to differ so materially with the court, that we have ventured upon a petition for re-hearing, being well aware of the usual fate that awaits these documents.

But, in excuse, we must refer the court to the fact that this case presents questions that are entirely novel, new to this court: That the effect of the court's decision if followed by other jurisdictions will be so far reaching, upsetting a long line of decisions, and preconceived ideas maintained by the bench and bar, that most respectfully we take the liberty, in this petition of again asking this court to re-consider its action had on December 17, 1903.

We invite the court's attention to the issues made by the statement filed under the statute, by the appellant, and to the answer filed by the appellee. By the statement it substantially alleged that
47 the appellee during the years named therein was a corporation, with its office located in McCracken county, Kentucky, and was the owner of the different boat property and barges, upon which a valuation is set in the statement; and the assessment and valuation of the property is asked for those years, for State, county and municipal taxation, and the 20 per cent. penalty due to the auditors agent, and this request is made because appellee has failed so to assess its property—that the boats were enrolled at Paducah, and the words Paducah, Ky., painted on their stern.

The answer takes issue with the appellant in its statement as to valuation of its property, as to its having no other office but the one in Paducah, McCracken, county, Ky. It alleges that it is a corporation created under the laws of the State of Illinois, files its certificate of incorporation from the secretary of that State, that it is and was, during the years named in the statement engaged in interstate commerce, that the boats were duly licensed under United States laws:—It is also alleged that the appellee had an office at Duval's Bluff, Ark; Brookport, State of Ill.; Evansville, State of Ind.; St. Louis, Mo.; Paducah and Fulton, Ky., and at Chtcago, Ill.; that its main and principal office was and is in this last named city,
48 of which city and State it was and is a citizen and resident; where it was assessed on said property and paid its taxes; that their different boats and barges were used by appellee in transporting ties from places on the Ohio, Tennessee and other rivers to Brookport, Illinois; Duvall's Bluff, Arkansas; and St. Louis, Mo., and Evansville, Indiana: that said boats came to Paducah only temporarily, touching only to purchase supplies, employ its crews, and never to receive or discharge its load.

To this answer, a demurrer was filed in the county court, and the same was overruled, and an appeal prayed by the appellant, to the circuit court when its demurrer was considered by this last named

ourt, and overruled, and its statement dismissed—to which exceptions were entered, and an appeal prayed and prosecuted to this ourt. The demurrer confessed the truth of these allegations of fact, nd denial, stated in the answer. The court must have overlooked he allegation in the answer of the existance of a state of facts that ntirely puts beyond question that the appellee's property had ever become incorporated into the property of the State of Kentucky, that its temporary visits to the port of Paducah, were merely for supplies and men within the principles announced by the U. S. Supreme Court in Hays *vs.* Pacific Mail Steam-ship Co., 17th Howard 506, placed it beyond the taxing power of the State of Kentucky.

We have then under the pleadings of this case, this presentation, pon which the court rested its opinion that Paducah, Kentucky, vas the home port of these boats of appellees, and their situs for axation. The bare facts of the enrollment of appellee's boats at Paducah, and painting the name of that city upon the stern of it's essels notwithstanding the facts alleged and not denied, that the aid boats were, and are owned by the appellee alone; an Illinois orporation, located in Chicago, in that State, where its principal ffice is and was, and that its boats touched at the city of Paducah, Ky., only temporarily; never receiving or discharging their cargo.

This conclusion we dominate a radical departure. The record in his case and the court's opinions, present Federal questions of the gravest moment. And we invite the court's attention to a question, that threatens to become a cause celebre.

It is conceded by the court in its opinion that the situs for he purpose of taxation of this property is its home port. And the ourt holds that the owner can fix the home port of his property by ainting on the stern of his vessels, the name of the place in the ame district where she was built, or where she is registered or enrolled, or where one or more of the owners reside, and that because he name of the city of Paducah, Ky., was painted on the stern of ppellee's vessels, that under the act of Congress passed in 1884, mending section 4178 and 4334 of Revised Statutes of the United States, Paducah became the home port of appellee's vessels and their itus for taxation.

And this brings us to the consideration of the different acts of Congress controlling this case. They are sections 4141, 4178, and 4334, and what your honors denominate as the acts of 1884 and 1894. These acts read, as follows:

Section 4141. "Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district, which included the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at, or nearest the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel usually resides."

Section 4178. "The name of every registered vessel, and of the

port to which she shall belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. If any vessel of the United States shall be found without having her name and the name of the port to which she belongs so painted, the owner, or owners, shall be liable to a penalty of $50."

Section 4334. "Every licensed vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting, the owner thereof shall be liable to a penalty of $20."

Acts, 1884. "The word 'port,' as used in sections 4178 and 4334 of the Revised States, in reference to painting the name and port of every registered or licensed vessel on the stern of said vessels, shall be construed to mean, either the port where the vessel is reg-
52 istered, or enrolled, or the place in the same district where the vessel was built, or where one or more of the owners reside."

Acts, 1894. "The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilted, or consist of cut, or carved, or cast Roman letters, in light color on a dark ground, or in a dark color on a light ground, secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked, the owner, or owners shall be liable to a penalty of $10 for each name omitted."

Section 4141, in all cases, "except as is hereinafter provided," makes it mandatory, that every vessel shall be registered by the collector of that collection district, which includes the port, "to which said vessel shall belong."

It then becomes necessary to locate or specify the port "to which said vessel shall belong." This is done in the remaining part of the section, which is applicable to the case, at bar, reads, as follows:

"Which port shall be deemed to be that at, or nearest to
53 which the owner, if there be but one, usually resides."

Section 4178, makes it mandatory upon the owner to have the name and port of his vessel painted on her stern. Sections 4141 and 4178 are very old laws, having been passed by Congress in 1792. It became highly necessary that Congress should pass a law defining what was the home port of a vessel. Before the adoption of the Constitution, the admiralty law, as practiced and understood in continental Europe, differed in some respects, from the same as practiced and understood in England. By both laws, a vessel as such, *eo nomine*, could be emparled, seized and sold under decree of court. That a thing could be sued was unknown and anomalous to the common law. Hence a feeling of jealously arose between the high court of admiralty in England, and the common law courts. The common law courts succeeded in confining the admiral's jurisdic-

tion to the ebb and flow of the tide. Across the channel in Europe, the admiralty jurisdiction embraced the seas and all navigable waters. In England the doctrine became firmly established that there was no lien on a vessel for supplies furnished, and repairs done to her in her home port.

54 Across the channel, a lien existed against a vessel for supplies furnished to the vessel, irrespective of the port where furnished, same being a maritime contract capable of being enforced by process *in rem* against the vessel. The Constitution of the United States conferred upon, or recognized the exclusive admiralty jurisdiction of United — court, article 11, sec. 2. For a number of years after the adoption of the Constitution, in the Thomas Jefferson and other cases, the Supreme Court held to the English rule that the admiralty jurisdiction of the United States court was confined to the ebb and flow of the tide. Then there were enacted laws in many of the States providing for the enforcement of liens given by the State statutes in the State court by imparling the vessel and owners.

These laws were acquiesced in; vessels were sold by sheriffs and commissioners of the court, until the great case of Hine *vs.* Trevor was decided by the Supreme Court of — United States, which was followed by other decisions, firmly establishing the doctrine that the admiralty jurisdiction of the United — court extended to all the navigable waters and rivers of this country. These State

55 statutes, above alluded to, were all held to be unconstitutional.

There remains, then, another vexed quesion: That of a lien for supplies furnished to a vessel in her home port. Many admiralty lawyers, as well as many of the United States district courts were of the opinion that the rule obtaining to Europe, that there was a lien on the vessel for supplies furnished her in her home port, was the law of this country. The question finally came before the Supreme Court and was decided by that court in the famous case of the General Smith (A. D. 1819), 4th Wheaton, 438. In that case, the English law was followed and it was adjudged that there was no maritime lien enforceable in admiralty against a vessel for supplies furnished in the home port. This case has never been overruled, although questioned by the district courts. Finally, the Supreme court in the Lottawanna, 88 U. S., 520, and the Edith, 94 U. S., 518, have re-affirmed the Smith case. Thus we see the doctrine firmly established that there is no maritime lien for supplies furnished to a vessel in her home port. Congress, by the act of 1792, (sec. 4141, Rev. Stat. U. S.), defined where this home port was.

56 The Supreme Court, as we will see, has uniformly adhered to this definition of the home port, contained in sec. 4141, and will do so unless the Supreme Court, following your honor's opinion, determines that this matter of the home port of a vessel can be at the caprice of the vessel owner, fixed at a place in the same district

where she was built, or where one or more of her owners reside, or the port where the vessel is registered, or enrolled.

So, following the reason of the doctrine of the General Smith in the case of the Mono-gahala Navigation Company *vs.* The Bob Connell, 1st Federal Rep., 218, the court held that a claim for lockage on a navigable river is maritime, and cognizable in admiralty, but, when it appears that the service was rendered in the home port, the general maritime law did not give a lien. Let us stop and contemplate the effect that this ruling will have on the question of lien for supplies in the home port. The maritime lien is denied because the supplies being furnished where the owner resided, it is conclusively presumed it was done on his credit alone. Now, by this new interpretation of the law, we have the anomalous presentation of
57 a vessel built and launched and equipped, and setting sail at New Albany, Indiana, from Howard's ship yard and landing, destined for the port of New Orleans, La., to run alone in the lower Mississippi trade, never returning, or never expecting to return to New Albany, Indiana, with the name of New Albany painted on her stern (where she was built), contracting debts for supplies and repairs furnished and done to, and on her, in the port of New Orleans, where the owner resides, and is well known to the creditor who furnishes the supplies. He, (the creditor), has a maritime lien for these supplies, and enforces it by libel against the vessel in the United States district court at New Orleans. The owner cannot be heard to say that New Orleans is the home port of the vessel, and no maritime lien exists.

Or, to go a little further, suppose this vessel should return to New Albany, and while there contract debts for supplies and repairs. Has the creditor under the principles announced in the General Smith, a maritime lien for these supplies furnished to the vessel when in New Albany? If the construction given by your honors is correct, we would ask what becomes of the doctrine announced by the Supreme Court
58 in the General Smith, 4th Wheaton, 438., Peyroux *vs.* Howard, 7 Pet. 324., the Edith, 94 U. S., 518, and many other decisions along the same line. Did Congress contemplate any such radical change? And yet, how can such change be avoided if the owner, at his pleasure, can fix his home port in either of three ways authorized by the statute of 1884? To further illustrate, the appellee is the owner of some three or four steam-towboats, being a corporation "and able to migrate," was built, as we are informed, in Pittsburg; the second, third and fourth, perhaps in different places. On the stern of it's Pittsburg boat, it has painted the name of that city, and *eo instanto* Pittsburg becomes its home port, it's situs for taxation. And so as to it's three other boats on which are painted the names of the respective cities where built, Paducah being one of them. Then we have the anomalous presentation of one and sole owner appellee of four different steam towboats—each having a separate home port, and the situs of their taxation fixed by this

ourt's decision at the four different cities, whose names are painted n the separate sterns of the tow-boats.

What becomes of the controlling reason lying as the basis
9 of the decision of the General Smith, the Edith, etc., to-wit: That supplies furnished to, and repairs done on a domestic essel, in her home port, are not maritime liens because conclusively resumed to be done and furnished on the sole credit of the boat wner, he being a resident of that port. When this owner has four orts for his vessels, and only one port at which he resides, and that ne neither one of the four. Again, the construction placed by your onors upon the act of 1884, would produce confusion in reference o the recording of bills of sale and mortgages of vessels. By an act f Congress, passed July 29, 1859, it is provided:

"That no bill of sale, mortgage, hypothecation or conveyance of ny vessel, or part of vessel, of the United States, shall be valid gainst any person other than the grantor, or mortgagor, his heirs nd devisees, and persons having actual notice thereof, unless such ill of sale, mortgage, hypothecation or conveyance, be recorded in he office of the collector of customs where such vessel is registered r enrolled." The court *In re* White's Bank *vs.* Smith 74, U. S., 211, referring to this act, adds:

60 "The next section provides for recording these bills of sale, etc., and also certificates of discharge and cancellation n a proper book. No provision was made for any authentication f these instruments preparatory to their being recorded. They ere received by the collector from the parties delivering them, nd were recorded, with no proof of their verity, except from the xecution of the same, as appeared on their face; and this, both as t respects the bills of sale, mortgages, etc., and the discharge and ancellation of the same. And the law thus stood for some fifteen ears. On March 3, 1865, it was enacted that "no bill of sale, mortgage, hypothecation conveyance or discharge of mortgage, or other ncumbrance of any vessel, shall be recorded unless the same is duly cknowledged before a notary public, or other officer authorized to ake acknowledgment of deeds." 7th Wallace, 74, U. S., 211., White's Bank *vs.* Smith.

This act was before the Supreme Court for construction *In re* White's Bank *vs.* Smith, 74, U. S., 211, and it was then held that bills of sale of, and mortgages on such vessels, should be re-
61 corded in the home port of the vessel, where the vessel was permanently registered or enrolled. If it is competent for he owner to change his home port from that where she was permanently registered, and which as held in the case of White's Bank s. Smith, under sec. 4141, Revised Statutes, is the place where the wner, if one, usually resides, then no longer does sec. 4141 govern s to the place of recording bills of sale and mortgages of vessels. The result would be those doing business with a vessel as purchaser, nortgage creditor, or otherwise, would be called on to look up the

records in the collector's office in all the places designated in the act of 1884, as places that can be painted on the stern of the vessel.

We submit, it would be hazardous to one's interest to deal with vessels by way of mortgage, or hypothecation, or to acquire title by bill of sale. Again we inquire: Is it fair to presume that Congress, by the passage of the act of 1884, intended to make this change in the law, and impose these burdens on ship owners and creditors?

The question has frequently been before the Federal courts involving the claims of material men, and the right of taxation
62 of vessels, and as to whether the place where the vessel is registered, or enrolled, determines the home port.

In the Jennie B. Gilkey 19th Federal Rep. 128, Judge Lowell, circuit judge, used the following language: "It has ofter been decided that the place of residence of the owners is to be considered the home port, even when the registration is in another State, if the facts of ownership and residence were known, or might have been known, to the material man. (The Golden Gate, Newb., 308. The Albany 4th Dill., 439. The E. A. Barnard, 2 Fed. Rep., 712. The Mary Chilton, 4 Fed. Rep., 487.)"

So, in the leading case of The City of St. Louis *vs.* The Wiggins Ferry Company, 11 Wallace, 423, the Supreme Court held that the property of the Wiggins Ferry Company, an Illinois corporation was taxable in Illinois, and not in the city of St. Louis, Mo., notwithstanding the fact that the vessels of the ferry company were registered or enrolled in the city of St. Louis, Mo. It was found in that case that altho' the Wiggins Ferry Co. operated and used a number of steam-boats in its ferry business from the port of St. Louis to and from the State of Illinois opposite, and had an
63 office in Illinois, and also in St. Louis, Mo., and its vessels were enrolled in St. Louis, yet, as the property had not actuall- become incorporated into the property of the State of Missouri, the situs of taxation was Illinois. That court, per Swayne justice, used the following language: "The boats are enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, sec. 2, 1 Stat. at L., 55, and the act of 1792, sec. 3, 1 Stat. at L., 287, require every vessel to be registered in the district to which she belongs, and the 4th section of the former act, and the 3rd section of the latter, declares that her home port shall be that at, or near, which her owner resides. The solution of the question, where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrollment. 3 Kent Com., 133 170; Hill *vs.* The Golden Gate, Newb., 368; Superior, Newb., 181; Jordon *vs.* Young, 37 Me., 27 29.

Now, we inquire: Is it not as much imperative on the owner to register his vessel in her home port, as it is by sec. 4178, to have the name of the home port painted on her stern? In other
64 words does not the act of registering the vessel determine her home port equally as much as the act of painting the name of the place upon the stern of the vessel? Both are made impera-

tive upon the owner. And yet, as held by that court, the place of the enrollment of the vessel throws no light on the subject as to where is her home port, and the situs of taxation.

Then we inquire: Why are these things required to be done? Counsel for the plaintiff in error, *In re* The City of St. Louis *vs.* The Wiggins Ferry Company, *supra*—was careful to state to the court in his brief, that: "It is not claimed that the enrollment of these ferry boats at the port of St. Louis is conclusive as *the* the situs of the property. The enrollment simply indicates the domicil or home port of the vessels, and it is a circumstance to be considered in connection with the other facts in the case, in determining the question at issue." See epitome of argument in said case.

So in the Jennie B. Gilkey, 19 Fed. Rep., 128 (*supra*), the court approved and referred to the decision rendered by Judge Clifford in the Martha Washington, 1 Clifford, 463, that the object of the
65 statutes in requiring the name of the port of registry to be painted on her stern was to give notice to those interested, of the home of the vessel. But this notice was no more complete, than the registry and enrollment, which by act of Congress is required to be framed and hung in a conspicuous place in the boat's cabin, and which shows in which port she is registered, or enrolled. Parties dealing with her can read the name on her stern, and then go on the vessel, and in her cabin read where she is registered, or enrolled. And yet, in view of all these facts, the Supreme Court in the Wiggins Ferry Co. case, was emphatic in saying that the place of her enrollment (and we might add, the name painted on her stern), "threw no light upon the subject then being inquired into," to-wit: the all important question of the situs of taxation of steamboat property.

And let us inquire: Why should not that court refuse to regard these questions, when the principle was so well known to the court, that the law governing personal property was the law of the residence of the owner, as regards taxation and in other respects? The policy of the law is that there must be a fixed place where the
66 owner of personal property is called upon to assess and pay taxes on same; and that is the place of his residence. Unless by his own act, he takes this particular personal property and incorporates it into the property of another State.

And yet, under your honors' ruling in this case, this elementary doctrine, so rigidly adhered to by the Supreme Court, of the actual residence of the boat owner, fixing the situs of the boat's taxation, is entirely overthrown, and that because Congress has amended sec. 4178, (and not 4141, wherein the home port is defined), by the act of 1884, "in reference to painting the name and port of every registered, or licensed, vessel on the stern of said vessels, and has given to the boat owner the right to paint the name of (1), the port where the vessel is registered, or enrolled, or (2), the place in the same district where the vessel was built, or (3), the place where one or more of the owners reside."

This court thereby determines that because the name of Paducah, Ky., was painted on the stern of appellee's boats, that it thereby shifted its place of taxation. In other words, that the mere physical act of painting the name on the boat's stern, changed
67 the law that the actual residence of the owner controls the situs of the taxation of his personal estate.

The attention of your honors is referred to the case of the Mary Chilton, 4 Fed. Rep., 847, opinion by Judge Choate. The facts disclosed that the name painted on the stern of the vessel was New London, and the owner's residence was New York city. That fact did not prevent the court from holding that the owner's place of residence was the home port of the vessel; that there was no lien for supplies furnished to her in New York. This case is quite in point, and was decided years after the adoption of the act of 1792.

But what is the proper construction to place on the act of 1884? The law as it existed in 1884, permitted ship owners, or the owners of vessels engaged in domestic commerce, to procure temporary enrollment papers, in ports other than where she was permanently enrolled, 1 Parsons Shipping and Admiralty, sec. 4, page 37, under the title "Of the effect of registry and enrollment," speaking of vessels registered, or enrolled under the act of 1792 and 1793.

68 "The statutes of registry and enrollment are now somewhat numerous and complicated; and those of 1792 and 1793 are very long, and go into a great variety of details. For these we must refer to the appendix, where will be found all these statutes. Here we only remark, that enrolled vessels must be licensed annually for the employment or business in which they are to engage, and this is stated in the license, and they are not authorized by it to engage in any other; and if they be found with a forged or altered license, or making use of a license granted to any other ship, or vessel, the vessel and cargo are forfeited.

If they are in a port other than that to which they belong, at the time when their license expires, they may there obtain temporary registers."

And again, the same author on page 35, says:

"Any vessel which is entitled to registry, and is in a district other than that to which she belongs, may be registered in that district. This, however, is only a temporary register, and must be surrendered and cancelled when she arrives in the district to which she belongs, and a permanent register granted."

69 There has been no change, as we have discovered, in reference to the subjects treated of above by the learned author in his valuable work. Thus, exigencies of trade moved Congress to pass laws permitting temporary enrollments. So, manifestly, Congress by the act of 1884, intended that the owner, for purpose of commerce, and in furtherance of his business, might paint the name of the headquarters of his vessels on their stern, and not be restricted to the place of his residence. This was evidently not intended to alter the home port, either on the subject of taxation, or

r supplies furnished to her, or for purposes of recording bills of
le and mortgages.

To illustrate: Vessels owned at Pittsburg, may be placed by their
wner- in the trade up the Cumberland or Tennessee, or Mississippi
vers. Here they may engage in a profitable business. When their
enses expire, they can be enrolled at Paducah, or St. Louis, and
is enrollment, although called temporary, may exist until the
essel returns, if ever, to her home port of Pittsburg. To have
ne vessel enrolled in one city, and the name of another city painted
on her stern, might produce confusion. Hence, in order that
0 the public may know her headquarters, and where her owner
is ready to settle or transact her business, the name of this
lace of enrollment is painted on her stern.

Vessels are tramps. They are made "to plow the seas, and not
o rot at wharves." Their business headquarters change. Those
who deal with them, wish to know where to find them. Hence one
f these places named in the act of 1884, that can be painted on
her stern, is the place of her enrollment. Now this place of enroll-
ment evidently was not intended to be the place of her permanent
enrollment, for the reason that the third place named, to-wit:
"where one or more of her owners reside," is substantially the same
as sec. 4141, U. S. Rev. Stat. In other words, that either the place
where she is temporarily enrolled, or the place where one or more
of her owners reside, and where under sec. 4141, "she must be
permanently registered, or enrolled, or the place in the same district
where she was built, can be painted on the stern of the vessel."

Your honors seem to conclude, because the act of 1884 was passed
amending sec. 4178, that it operated to repeal sec. 4141, de-
71 fining, as interpreted by the courts, the home port of the ves-
sel. We think they can be harmonized as above set forth by
us. Repeals by implications are not favored. Had Congress in-
tended to repeal or amend sec. 4141, would it not have so declared?

Your honors refer to later acts, that of 1891 and 1897, quoted in
this petition, as strengthening the position of the court. The act
says the name of the home port shall be painted on all documented
vessels. This, we think is nothing more than re-affirming sec. 4141,
wherein the home port is defined as being that of the owner's resi-
dence, if only one owner.

We trust that your honors will sustain the appellee's motion.

Respectfully,

AYER & LORD TIE COMPANY,
By CAMPBELL & CAMPBELL, Attorneys.

Commonwealth of Ky. *vs.* Ayer & Lord Tie Company. Exhibit "X." Filed June 4, 1904. H. H. Hobson, clerk.

72 And afterwards on the 18th day of March at a court of ap-
peals at the capitol at Frankfort, the following order was
entered towit:

"COM'TH, by, etc.
*vs.*
AYER & LORD TIE COMPANY. } McCracken

The court being sufficiently advised it is considered that appellee's petition for re-hearing be and the same is overruled.

"Response is delivered."

And on said date the following response was delivered to the petition for re-hearing:

Court of Appeals of Kentucky.

MARCH 18, 1904.

COMMONWEALTH, by, &c., Appellants,
*vs.*
AYER & LORD TIE COMPANY, Appellee. } Appeal from McCracken Circuit Court.

Response to Petition for Rehearing, by Judge Hobson.

Section 4141, Revised Statutes of the United States, provides that the home port of vessels should be that at, or nearest to, which the owner, if there be but one, usually resides. Section 4178 and
73 4334 that the name of this home port should be painted on the stern of the vessels, with appropriate penalty for disobedience. The act of 1884 prescribes that the word "port," as used in section 4178 and 4334, in reference to painting the name and port of registered or licensed vessels on their sterns, should be construed to mean, either the port where the vessel is registered or enrolled, the place in the same district where the vessel was built, or where one or more of the owner's reside.

The argument of counsel for appellee, that the act of 1884, while changing the meaning of the word "port" in sections 4178 and 4334, left it unchanged, as used in section 4141, amounts to this:

That the Congress of the United States, after a policy continued throughout a century, requiring the name of the home port to be painted on the stern of the vessels, suddenly changed that policy, without any apparent reason, and permitted the name of a port, which was not the home port, to be painted thereon.

We think that Congress required the name of the home port to be painted on the stern of the vessel for a wise and useful
74 purpose, enabling all persons, who had dealings with them, to know where they belonged; and we are not willing to lightly adopt a construction, that it was intended by the act of 1884 to leave the place where the owner resides as the home port of the vessel, and yet permit the name of another port to be painted upon the stern. This construction would not only fail to enable persons dealing with vessels to know, of certainty, their home port, but it

would absolutely mislead, by permitting false information to be hung out under governmental sanction.

Petition for re-hearing overruled.

75 Please Before the Honorable the Court of Appeals of Kentucky, at the Capitol at Frankfort, on the 22nd Day of March, 1905.

THE AYER & LORD TIE COMPANY, Appellant,
*vs.*
THE COMMONWEALTH OF KENTUCKY, by Frank A. Lucas, Appellee.
} Appeal from the McCracken Circuit Court.

Be it remembered that heretofore to-wit, on the 2nd day of December 1904, the appellant by its attorney filed in the office of the clerk of the court of appeals a transcript of the record which is in words and figures as follows towit:

Please Before the Hon. W. M. Reed, Judge of the McCracken Circuit Court, at the Court House, in the City of Paducah, Ky., on the 4th Day of June, 1904.

COMMONWEALTH OF KENTUCKY, by FRANK A. Lucas, Revenue Agent, Plaintiff,
*vs.*
AYER & LORD TIE COMPANY, Defendant.
} Petition Ordinary.

Be it remembered that heretofore an appeal was taken by the plaintiff, from the judgement of this court, rendered on the
76 first trial of this action, and a transcript of the record of this action, of said first trial, is now on file in the clerk's office of the court of appeals.

The following proceedings have been had herein, since this action came from the court of appeals, as follows, viz:—

At the April criminal term, 1904, of the above named court, of the 14th day of April, 1904, the following order was made herein, viz:—

Ordered that this action be reinstated on the docket, and the following mandate was filed herein, viz:—

Mandate.

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals, December 17th, 1903.

| | |
|---|---|
| COMMONWEALTH OF KENTUCKY, by, &c., Appellant. *against* AYER & LORD TIE CO., Appellee. | Appeal from a Judgement of the McCracken Circuit Court. |

The court being sufficiently advised, it seems to them the judgement herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for proceedings consistent with the opinion herein.

Which is ordered to be certified to said court.

A copy.
Attest:
Issued April 13th, 1904.

J. MORGAN CHINN, C. C. A.
By H. L. EVANS, D. C.

77 In pursuance to the foregoing mandate, it is ordered by the court that the judgement of this court, rendered herein be and the same is now set aside, and a new trial is granted herein.

Afterwards to wit:—At the April civil term of the above named court, on the 28th day of April, 1904, the following order was made herein, viz:—

This day came plaintiff, and filed copy of opinion and response to petition for re-hearing of court of appeals, and also filed brief of said pl'ff.

The following is the opinion and response to petition for re-hearing of court of appeals referred to in the foregoing order, viz:—

(For opinion see page 32.)

Court of Appeals of Kentucky.

MARCH 18, 1904.

| | |
|---|---|
| COMMONWEALTH, by, &c., Appellants, *vs.* AYER & LORD TIE COMPANY, Appellee. | Appeal from McCracken Circuit Court. |

78 Response to Petition for Rehearing by Judge Hobson.

Section 4141, Revised Statutes of the United States, provides that the home port of vessels should be that at, or nearest to, which the

r, if there be but one, usually resides Section 4178 and 4334
re that the name of this home port should be painted upon the
of the vessels, with appropriate penalty for disobedience. The
1884 prescribes that the word "port," and used in section
and 4334, in reference to painting the name and port of regis-
or licensed vessels on their sterns, should be construed to
either the port where the vessel is registered or enrolled, the
in the same district where the vessel was built, or where one
ore of the owners reside.

e argument of counsel for appellee, that the act of 1884, while
ging the name of the word "port" in sections 4178 and 4334,
t unchanged, as used in section 4141, amounts to this: that the
gress of the United States after a policy continued throughout
ntury, requiring the name of the home port to be painted on
the stern of the vessels, suddenly changed that policy, without
any apparent reason, and permitted the name of a port, which
was not the home port, to be painted thereon.

e think that Congress required the name of the home port to
ainted on the stern of the vessel for a wise and useful purpose,
oling all persons, who had dealings with them, to know where
belonged; we are not willing to lightly adopt a construction,
it was intended by the act of 1884 to leave the place where the
er resides as the home port of the vessel, and yet permit the
e of another port to be painted upon the stern. This construc-
would not only fail to enable persons dealing with vessels to
w, of certainty, their home port, but it would absolutely mis-
l, by permitting false information to be hung out under govern-
ntal sanction.

etition for re-hearing overruled.

CAMPBELL & CAMPBELL,
For Appellee.

RANK A. LUCAS,
For Appellant.

The folllowing is the brief of pl'ffs, referred to in the foregoing
ler, viz:—

Brief of Pl'ffs.

This cause is now before this court, the former action of this court in overruling plaintiff's demurrer to defendant's swer having been reversed by the court of appeals and the case nanded to this court for further proceedings not inconsistent with e opinion of that court herein. A copy of this opinion of the court appeals and the response of said court to defendant's petition for re-hearing are filed in the papers herein.

As will be seen from an examination of said opinion, the court of peals very carefully considered all the defenses raised by the defend-t's answer herein, and finding none of them good, said in its opinion

that, "the demurrer to the answer should have been sustained." This court, then, of course, will not hesitate to now sustain plaintiff's demurrer to said answer, and no further answer or other defense having been tendered by the defendant, we think nothing remains except to take the allegations of plaintiff's petition for confessed and to render judgment according to the prayer thereof.

Respectfully submitted, FRANK A. LUCAS,
Revenue Ag't.

81 Afterwards towit—at the same term of the above named court, on the 4th day of June, 1904, the following order was made herein, viz:—

Judgement.

This day the following judgement was filed herein, viz:—"This day this cause was submitted to the court without intervention of the jury. Then came the defendant, and on its motion filed as part of the records of this action, its petition for re-hearing on the trial of this action, in the court of appeals of Kentucky, marked Exhibit "X." And defendant moves the court to state its conclusion of facts separately from its conclusion of law, and this case coming on for hearing, upon the pleadings and mandate and opinion of the court of appeals, filed herein, and the defendant's petition for re-hearing filed herein, it is the judgement of the court that the demurrer to the defendant's answer herein, be now sustained, to which the defendant excepts, and the defendant declining to further plead, the allegation of plaintiff's statements are taken for confessed, and it is adjudged the property therein described is liable for taxation, as therein set forth, and to be omitted from assessment, to which defendant excepts. Then came plaintiff and moved to remand
82 this cause to the McCracken county court, for the purpose of having that court fix the assessible value of the omitted property, and assess same, and the court being sufficiently advised overruled said motion to which plaintiff excepted.

Then came the parties, and it being taken for confessed that the value for purposes of assessment of the various barges and boats for the various years mentioned in plaintiff's statement, are as set forth is said statement, except that the steamer Inverness, on September 15, 1901, was only worth $2500.00. It is therefore the judgement of the court that the defendant, the Ayer & Lord Tie Company be assessed as follows:

Upon the steamer Russel Lord, as of September 15, 1899, 1900 and 1901, at $13,000.00. Upon the steamer Pavonia, as of September 15, 1899, 1900 and 1901, at $3000.00. Upon the ste-mer Inverness, as of September 15, 1901 at $2500. Upon the barges owned by said company as of September 15, 1899, 1900 and 1901 at $10,000.00.

The defendant is further adjudged to pay the taxes due to the State of Kentucky, the county of McCracken and city of Paducah upon the foregoing assessment, together with a penalty of 20% of the total amount of said taxes due to Frank A. Lucas, rev-
83 enue agent.

The clerk of this court is hereby ordered and directed to certify the foregoing assessment to the auditor of public accounts for the State of Kentucky, and to the sheriff of McCracken county, for collection, and the defendant is adjudged to pay the costs of this action to all of which the defendant excepts.

The court in compliance with the request of the defendant files as part of this judgement its conclusions of fact, separately from its conclusions of law as follows, towit:—

Upon the hearing of this case, the court finds the facts to be:

Separation of Findings of Facts from Conclusions of Law.

1. That the defendant was at the time specified in the pleadings, the sole owner of the following described property, named in the petition towit: Steamers Russel Lord, Pavonia, Inverness and barges. That the same were of the value as follows: as set out in the statement. Russel Lord, $13,000 Pavonia, $10,000 00, Inverness, $2500.00, barges $10,000.00 that the defendant had enrolled said steamboats at Paducah, Kentucky, with the name "Paducah" painted on the stern of said vessels; that the defendant was a corporation legally incorporated under the laws of the State of Illi-
nois.

84 As a matter of law, the court adjudges that the port of Paducah, Kentucky, was at the times mentioned in the statement, the home port of said vessels and barges belonging to defendant, and named in the statement, and that all of said vessels were liable to assessment and valuation at the times stated in the statement, in McCracken county, Kentucky, for purposes of State, county and city taxes, for the years respectively. Russel Lord and Pavonia, 1899, 1900 and 1901. Inverness 1901, barges, 1899, 1900 and 1901. The defendant excepts to each of the above findings of facts and also to all of the conclusions of law."

The defendant, then on the same day filed written motion and moved the court to set aside the foregoing judgement and grant it a new trial herein, and in support of said motion filed reasons.

Exhibit "X," referred to above will be found coppied on page 44.

The following is the motion and reasons for a new trial referred to in the foregoing order, viz:—

Motion & Reasons for New Trial.

The defendant Ayer & Lord Tie Company comes and
85 moves the court to set aside the judgement herein and grant it a new trial, for the following reasons:—

1st. Because the judgement of the court is contrary to law.

2. Because the court erred in sustaining the demurrer filed by plaintiff to defendant's answer, to which defendant excepted at the time and still excepts.

3. Because the court erred in its conclusions of facts, to which defendant excepted at the time and still excepts.

4. Because the court erred in its conclusions of law, to which the defendant excepted at the time and still excepts.

AYER & LORD TIE COMPANY, Def't.
By CAMPBELL & CAMPBELL, Its Att's.

Afterwards towit:—at the extended April term of the above name- court, on the 7th day of June, 1904, the following was made herein, viz:—

86 This day came def't and produced to court bill of exceptions herein, which was signed by the judge of this court, and ordered to be filed and the same is now made a part of the record of this action.

The following is the bill of exceptions referred to in the foregoing order, viz:—

## Bill of Exceptions.

Be it remembered that on the trial of this action and on motion of the defendant the court presented and filed the separate conclusions of facts and separate conclusions of law; to both conclusions of law and conclusions of fact, both the plaintiff and defendant excepted. Said conclusions of law and conclusions of fact are in words and figures as follows, towit:—

Upon the hearing of this case, the court finds the facts to be:

1. That the defendant was at the time specified in the pleadings, the sole owner of the following described property, named in the

87 petition towit: Ste-mers, Russel Lord, Pavonia, Inverness and barges. That the same were of the value as follows: as set out in the statement. Russel Lord, $13,000.00; Pavonia, $10,000.00; Inverness, $2500.00; barges $10,000.00; that the defendent had enrolled said steamboats at Paducah, Kentucky, with the name "Paducah" painted on the stern of said vessels; that the defendant was a corporation legally incorporated under the laws of the State of Illinois.

As a matter of law, the court adjudges that the port of Paducah, Kentucky was at the times mentioned in the statement, the home port of said vessels and barges belonging to defendant, and named in the statement, and that all of said vessels were liable to assessment and valuation at the times stated in the statement, in McCracken county, Kentucky, for purposes of State, county and city taxes, for the years respectively. Russel Lord and Pavonia, 1899, 1900 and 1901. Inverness, 1901, barges, 1899, 1900 and 1901. The

defendant excepts to each of the above findings of facts and also to all of the conclusions of law.

This bill of exceptions is true.

W. M. REED, Judge.

88 Afterwards to wit:—at the same term of the above named court, on the 8th day of June, 1904, the following order was made herein, viz:—

The def't's motion heretofore entered to set aside the judgement of the court rendered herein, and to grant it a new trial, is upon the court being advised overruled, to which ruling of the court, the def't objects and excepts and prays an appeal to the court of appeals which is granted.

Appeal Granted.

Afterwards to wit:—in vacation, on the 8th day of August 1904 the following agreement was filed in the clerk's office of the above named court, viz:—

It is agreed by the parties that the clerk of this court in preparing the record in this action for appeal, do insert and attach as part of the record the printed petition for re-hearing to the court of appeals in the above styled action, and filed in this court June 4, 1904.

August 8, 1904.

FRANK A. LUCAS, Rev. Ag't.
AYER & LORD TIE CO.,
By CAMPBELL & CAMPBELL.

9 Afterwards to wit:—in vacation, on the 24th day of August, 1904, the following supersedeas bond was executed in the clerk's office of the above named court, viz:

Supersedeas Bond.

| | |
|---|---|
| YER & LORD TIE COMPANY, Appellant, *against* COM'TH OF KY., &c., Appellee. | Upon an Appeal Taken From a Judgement of the McCracken Circuit Court Rendered 4th day of June, 1904. |

Whereas, said appellant has taken an appeal from the judgement the McCracken circuit court, rendered at its April term, 1904, against it in favor of the appellee, adjudging that the appellee's property be assessed for taxation as set out in said judgement and that said appellee pay the taxes thereon in accordance with said assessment & that said appellee pay to Frank A. Lucas, revenue ag't 20% the total amount of said taxes & that said assessment be certified to the State auditor & to the sheriff of McCracken county, Ky.,

for collection, and that appellee pay all costs of the action, and the appellant desires to supersede the whole of the said judgement above mentioned:—

Now we, Ayer & Lord Tie Company principal and J. W. McKnight surety, do hereby covenant to and with the appellee Com'th
90 of Ky., by Frank A. Lucas revenue agent for the State at large that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the whole of the judgement above stated; in case it shall be affirmed, and any judgement or order which the court of appeals may render, or ordered to be rendered by the inferior court, not exceeding in amount or value the whole of the judgement aforesaid.

Witness our hands, this 24th day of August, 1904.

AYER & LORD TIE CO.,
Per JAMES CAMPBELL, Att'y.
J. W. McKNIGHT.

Attest:
H. H. HOBSON, Clerk,
By W. C. KIDD, D. C.

The following is the supersedeas which issued on the foregoing bond, viz:—

Supersedeas.

STATE OF KENTUCKY:

Clerk's Office of the McCracken Circuit Court.

I do certify that an appeal has been granted from this court from a judgement obtained by Com'th of Ky., by Frank A. Lucas
91 revenue agent for the State at large against Ayer & Lord Tie Company rendered on the 4th day of June, 1904, in the McCracken circuit court, at its April term, 1904, and that a supersedeas bond has been executed. Therefore the appellees and all others are commanded to stay proceedings on the judgement above recited.

Given under my hand, as clerk of said court, this 24th day of August, 1904.

H. H. HOBSON, Clerk,
By W. C. KIDD, D. C.

The following is the sheriff's return on the foregoing supersedeas, viz:—

Sheriff's Return on Supersedeas.

Executed by delivering to Frank Lucas revenue agent a copy of the within supersedeas Aug. 26, 1904.

L. D. POTTER, S. M. C.,
By WM. LYDON, D. S.

Clerk's Certificate.

STATE OF KENTUCKY, }
County of McCracken, } *sct:*

92 I, E. W. Hobson, clerk of the McCracken circuit court, within and for the county and State aforesaid, do certify that the foregoing 17 typewritten pages and this page, together with the printed petition for re-hearing to the court of appeals, hereto attached, contains a full, true and complete transcript of the record of this action, since it came from the court of appeals, as the same appears of record and on file in my office.

Given under my hand, as clerk of said court, this 28th day of Sept., 1904.

E. W. HOBSON, Clerk,
By —— ——, D. C.

Cost of record $7.60.

With the foregoing transcript the appellant filed a statement in the office of the clerk of the court of appeals in words and figures following to wit:—

93 Statement.

The appellant files the following statement:
The following are the names of the parties to this appeal:
Ayer & Lord Tie Company, appellant.
The Com'th of Kentucky by Frank A. Lucas, appellee.
The judegment appealed from can be found on pages 11 and 12 of this record, and was rendered at the April (civil) term of the McCracken circuit court, on the 4th day of June, 1904.
November 30, 1904.

AYER & LORD TIE COMPANY, Appellant,
By CAMPBELL & CAMPBELL, Att'ys.

Be it remembered that on the 17th day of February in the court of appeals of Ky. at Frankfort the following order was entered to wit:

"AYER & LORD TIE COMPANY
*vs.*
COM'TH, by etc. } McCracken.

Came appellant by counsel and on motion this case is ordered advanced under rule 16 of this court and submitted, and it is ordered that the record in the former appeal of Com'th of Ky. by etc. vs. Ayer & Lord Tie Company, be placed with and considered on the present appeal.

94 And afterwards on the 22nd day of March 1905 at a court of appeals at the capitol at Frankfort the following judgement was entered to wit:

AYER & LORD TIE COMPANY, Appellant,
*vs.*
COMMONWEALTH OF KY., by FRANK A. Lucas, Revenue Agent, Appellee.
} Appeal from McCracken Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgement herein.

It is therefore considered that said judgement be affirmed which is ordered certified to said court.

It is further considered that the appellee recover of the appellant his cost herein expended.

And on said date the court delivered the following opinion.

Court of Appeals of Kentucky.

MARCH 22, 1905.

AYER & LORD TIE COMPANY, Appellant,
*vs.*
COMMONWEALTH OF KENTUCKY, by FRANK A. Lucas, Revenue Agent, Appellee.
} Appeal from the McCracken Circuit Court.

95 Opinion of the Court by Judge Paynter.

This case was before the court by a former appeal. The question involved on this appeal was decided on the former one. Commonwealth, by etc. *vs.* Ayer & Lord Tie Co. 25 R. 2061. Whether the conclusions of the court were correct or not, the opinion is the law of this case. Therefore, it is unnecessary to further discuss the question involves.

The judgement is affirmed.

96 Be it remembered that afterwards on the 25th day of April 1905 there was filed in the office of the clerk of this court an assignment of errors which — in words and figures as follows to wit:

97 Kentucky Court of Appeals.

AYER & LORD TIE COMPANY, Appellant and Plaintiff in Error,
*vs.*
COMMONWEALTH OF KENTUCKY, by FRANK A. Lucas, Revenue Agent, Appellee and Defendant in Error.
} Assignment of Errors.

Appellant files herewith its petition for a writ of error, and says there are errors in the record and proceedings of the above case, and

for the purpose of having same reviewed in the Supreme Court of the United States makes the following assignment.

The court erred in its decision against the right of appellant to remove this cause to the circuit court of the United States, for the sixth circuit and western district of Kentucky.

The court erred in its decison that under and by virtue of section 4241 of Kentucky Statutes, the appellant was compelled to pay a tax on its steam-boats although engaged in interstate commerce, and the said decision and law are contrary to the Constitution of the United States, section eight of article one.

The court erred in its construction of the acts of Congress, sections 4141, 4178 and 4334, Revised Statutes, and the acts of Congress amending same, section 21, 23rd Statutes at Large, page 58 passed June 26, 1884, and erroneously under said statutes fixed situs of taxation of appellant's said property.

The court erred in rendering judgment against appellant.

The court erred in its first judgment in reversing the decision of the McCracken circuit court, and its second decision in affirming the judgment of said McCracken circuit court.

For which errors, Ayer & Lord Tie Company, the appellant, prays that the said judgments of the Kentucky court of appeals, rendered December 17, 1903, and March 22, 1905, be reversed, and a judgment rendered for the appellant, and for costs.

CAMPBELL & CAMPBELL,
Att'ys for Pl'ff in Error.

[Endorsed:] Filed Apr. 25, 1905. J. Morgan Chinn, C. C. A.

98 And afterwards *that* was filed in the office of the clerk of this court a petition for a writ of error from the United States Supreme Court to the court of appeals of the Commonwealth of Ky. and which petition is as follows:

99 Original.

Kentucky Court of Appeals.

| | |
|---|---|
| AYER & LORD TIE COMPANY, Appellant, *vs.* COMMONWEALTH OF KENTUCKY by FRANK A. Lucas, Revenue Agent, Appellee. | Petition for Writ of Error. |

Petition to the Chief Justice of the Court of Appeals of Kentucky for Writ of Error.

Because a manifest error hath happened in the rendition of a judgment against it by this court, as the highest court of law or equity in this State, in this cause wherein this court affirmed a

judgment of the McCracken circuit court rendered in this cause against it, according to the mandate and opinion of this court, wherein this court reversed a previous judgment of the said McCracken circuit court in this cause,—wherein was drawn in question the validity of a statute of the State of Kentucky imposing a tax on steam-boat owners using the Ohio river and its tributaries with their steam-boats for purpose of commerce between the States, and wherein was drawn in question the construction of an act of Congress in regard to the home port of vessels and the situs of taxation under said act, and wherein was drawn in question the right of removal of this cause to the circuit court of the United — for the sixth circuit for the western district of Kentucky. And all of said decisions being adverse to it, to the great damage of it, the said Ayer & Lord Tie Company and all of which appears in the record and proceedings in said suit.

Wherefore appellant prays for allowance of a writ of error, and such other process as may be necessary so that the said cause may be submitted to the Supreme Court of the United States.

Assignment of errors herewith.

CAMPBELL & CAMPBELL,
Attorneys for Appellant.

100 COMMONWEALTH OF KENTUCKY, Court of Appeals, } *ss*:

Let the writ of error issue upon the execution of a bond by Ayer & Lord Tie Company to the Commonwealth of Kentucky and Frank A. Lucas revenue agent, in the sum of $4000 *dollars*; said bond when approved to act as a supersedeas.

This 25 day of April 1905.

J. P. HOBSON,
Chief Justice of the Kentucky Court of Appeals.

The appellant is permitted to give bond in the sum of four thousand dollars ($4000.00) and ten days are given appellant to execute the bond.

Witness my hand as chief justice of the court — appeals of Kentucky this April 25 1905.

J. P. HOBSON.

[Endorsed:] Filed Apr. 25 1905 J. Morgan Chinn, C. C. A.

101 And afterwards on the 3rd day of May, 1905 there was filed in the office of the clerk of this court a writ of error and which is as follows:

102 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the court of appeals of the Commonwealth of Kentucky:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said court of appeals of Kentucky, before you on the 17th day of December, 1903 and also on the 22nd day of March of the January term, 1905, of your said court, between Ayer & Lord Tie Company, appellant, *versus* The Commonwealth of Kentucky by Frank A. Lucas, revenue agent, appellee a manifest error has happened, to the great damage of the said appellant, Ayer & Lord Tie Company, as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of the clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3d day of May, 1905.

Done in the city of Frankfort, with the seal of the United
103 States circuit court for the eastern district of Kentucky.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk United States Circuit Court,
Eastern District of Kentucky,
Per E. H. COLEMAN, D. C.

Allowed
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

103½ [Endorsed:] Filed May 3 1905 J. Morgan Chinn, C. C. A.

104 And afterwards on the 3rd day of May 1905, there was filed in the office of the clerk of this court a supersedeas bond, and which is as follows:

105 Supreme Court of the United States.

AYER & LORD TIE COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent, Defendants in Error. } Bond.

Know all men by these presents, that we, Ayer & Lord Tie Company as principal and the United States Fidelity & Guaranty Co. of Baltimore Md., as surety, are held and firmly bound unto the Commonwealth of Kentucky and Frank A. Lucas revenue agent, in the sum of four thousand dollars ($4000.00) to be paid to the said Commonwealth of Kentucky, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 3rd day of May, 1905.

Whereas, the above name- plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgement rendered in the above entitled action by the Kentucky court of appeals.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

106

AYER & LORD TIE COMPANY,
By JAMES CAMPBELL, Att'y in Fact.
THE UNITED STATES FIDELITY & GUARANTY COMPANY.
JAMES H. POLSGROVE,
Att'y in Fact.

The above bond is approved.
J. P. HOBSON,
Chief Justice of the Kentucky Court of Appeals.

Know all men by these presents, that it, the Ayer & Lord Tie Company, of Chicago, Illinoes, does hereby make, constitute and appoint James Campbell, of Paducah, Kentucky, its true and lawful attorney for it and in its name and stead to sign, execute and deliver any all appeal bonds or undertakings required or necessary to appeal or sue out a writ of error from the Supreme Court of the United States to the court of appeal of the State of Kentucky, in the case lately decided in the last named court, entitled Ayer & Lord Tie Company, appellant, *vs.* Commonwealth of Kentucky, appellee, to do and perform all the necessary acts in the execution and prosecution of the aforesaid business, and in as full and able a manner as it might do if it were personally present.

107

In witness whereof, the said Ayer & Lors Tie Company has hereunto set its seal.

AYER & LORD TIE COMPANY,
By A. A. CARPENTER, JR., & P.

[CORPORATE SEAL.]

Attest:
PHILLIP R. SMITH.

STATE OF ILLINOIS, County of Cook, } ss:

On this 25th day of April A. D., 1905, before me personally appeared A. A. Carpenter Jr. vice president, and Phil. R. Smith secretary, to me known to be the vice president and secretary of the Ayer & Lord Tie Company, who acknowledged the execution of the foregoing power of attorney as such vice president and secretary for and as the act of the said company.

A. H. NAYES,
Notary Public.

[NOTARY PUBLIC.]

108 And afterwards on the 3d day of May / 1905 there was filed in the office of the clerk of this court an order allowing schedule, and which is as follows:

109 Court of Appeals of Kentucky.

AYER & LORD TIE CO., Appellant,
vs.
COMMONWEALTH OF KY., by, &c., Appellee. } Schedule.

The clerk of the court of appeals will copy the entire record and proceedings in the above case for the Supreme Court of the United States.

CAMPBELL & CAMPBELL,
Attorneys for Appellant.

[Endorsed:] Filed May 3 1905 J. Morgan Chinn, C. A.

110 And afterward on the 3rd day of May 1905, there was filed in the office of the clerk of this court an original citation and which is as follows:

111 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Kentucky and Frank A. Lucas, revenue agent of said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the court of appeals of the Commonwealth of Kentucky wherein The Ayer & Lord Tie Company is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the court of appeals of Kentucky, this 3d day of May 1905.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
J. MORGAN CHINN,
Clerk of the Court of Appeals of Kentucky.

I hereby accept service of this citation for the Commonwealth of Kentucky, in the case of Ayer & Lord Tie Company against The Commonwealth of Kentucky, by L., this May 3d 1905.

NAPOLEON B. HAYS,
Attorney General of Commonwealth of Ky.

I hereby accept service of this citation, this May 5, 1905.

FRANK A. LUCAS,
Revenue Agent, Com. of Ky.

111½ [Endorsed:] Ayer & Lord Tie Co. *vs.* Com'th of Ky. by &c. Citation.

112 COMMONWEALTH OF KENTUCKY, }
Court of Appeals. }

I, J. Morgan Chinn, clerk of the court of appeals of the Commonwealth of Kentucky, do hereby certify that the foregoing pages contain a full, true and complete copy of the transcripts of the records and proceedings had in the court of appeals of the Commonwealth of Kentucky, including the opinion of said court, in the action of

THE AYER & LORD TIE COMPANY, Appellant,
*vs.*
MMONWEALTH OF KENTUCKY, by FRANK A. LUCAS, Revenue Agent, Appellee,

full and complete as the same remain on file and of record in my ice, which transcript I herewith submit in pursuance of the com- and of the writ of error thereto attached. I also certify that the iginal assignment of errors, petition for writ of error, the original it of error, a copy of the writ of error bond, the order allowing the it of error, and approving the bond, and the original citation with oof of service thereof, and the schedule and a copy of the power of attorney from the Ayer & Lord Tie Company to James
3 Campbell, are hereto attached and herewith returned.

In testimony whereof, I have hereunto set my hand and ixed the seal of said court. Done at the capitol, at Frankfort, y., this the 3rd day of May 1905.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of the
Commonwealth of Kentucky.

Fee for this transcript $29.00.

W. G. BAXTER,
Official Copyist, Court of Appeals, Kentucky.

Endorsed on cover: File No. 19,769. Kentucky court of ap- eals. Term No. 268. Ayer & Lord Tie Company, plaintiff in ror, *vs.* The Commonwealth of Kentucky, by Frank A. Lucas, venue agent of said Commonwealth. Filed May 22d, 1905. File o. 19,769.